No. 95-559

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DOCTOR'S ASSOCIATES, INC. and NICK LOMBARDI,
Petitioners,

v.

PAUL CASAROTTO, ET UX.,
Respondents.

On Writ of Certiorari to the Supreme Court of Montana

REPLY BRIEF FOR PETITIONERS

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Not satisfied with the reasoning of the Montana Supreme Court, or even with their own arguments to that court, respondents now offer two newly crafted arguments in support of the decision below. They no longer maintain, as the Montana Supreme Court did in each of its opinions, that *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), narrowed the preemptive scope of Section 2 of the Federal Arbitration Act ("FAA") to permit states to impose additional requirements for the enforcement of arbitration agreements. App. 26. As respondents appear belatedly to recognize, *Volt* did not redefine the grounds for enforcing an arbitration agreement under Section 2, and thus that decision does not support the Montana Supreme Court's refusal to enforce the parties' agreement to arbitrate.

Accordingly, respondents devote most of their brief to an effort to fit the Montana notice statute directly into

the text of Section 2, which provides that written arbitration agreements involving interstate commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Respondents' newly found argument proceeds in two steps. They first claim that Montana may, under its common law relating to adhesion contracts, invalidate arbitration clauses contained in standardized contracts because arbitration agreements are "unexpected" unless conspicuously disclosed. Resp. Br. at 24. Respondents then claim that Montana's notice statute merely codifies, and is a "particularized application" of, this supposed common law principle that would have allowed the Montana courts "to invalidate the arbitration provision in this case and in others as well." *Id.* Accordingly, respondents argue, the notice statute falls within Section 2's savings clause as a ground for "revocation of any contract."

Respondents' new arguments are as unavailing as their original ones. First, even if respondents were correct that the notice statute merely codifies Montana's common law relating to adhesion contracts, this Court has made it clear that, as a matter of federal law, a court may not rely upon the uniqueness of an agreement to arbitrate, and a state's suspicion of that method of dispute resolution, as a basis for a state law holding that enforcement of the arbitration agreement is unconscionable or "adhesive." And this is true whether the court is applying a state's statute, such as the notice statute, or its common law. Permitting courts to refuse enforcement of arbitration agreements unless they are more prominently highlighted than other terms of a standardized contract on the ground that arbitration is "unexpected" would wholly eviscerate Congress's intent to place arbitration agreements on the same footing as other contracts. Second, even if the FAA somehow permitted a state to invalidate arbitration agreements on the ground that they are "unconscionable" or "unexpected" unless they are conspicuously disclosed in

standardized contracts, the statute here goes far beyond any such principle, invalidating *all* arbitration agreements not meeting unique conditions—regardless of the circumstances of the agreement or the relative bargaining power of the parties.

Inevitably, therefore, respondents must argue that even though Montana's notice law is not a ground for revocation of contracts generally, the FAA nevertheless does not preempt state laws intended to provide "notice" of an arbitration provision to persons deemed in need of special protection. Beyond the obvious fact that Montana's law is not so limited, respondents have advanced no arguments that would warrant this Court overruling its numerous decisions holding that enforcement of arbitration agreements is a matter of federal law and that the broad principle of enforceability embodied in Section 2 is not subject to *any* limitations under state law.

I. MONTANA'S ARBITRATION NOTICE STATUTE IS NOT A GROUND FOR THE REVOCATION OF ANY CONTRACT WITHIN THE MEANING OF SECTION 2.

A. This Court has acknowledged "that a party may assert *general* contract defenses such as fraud to avoid enforcement of an arbitration agreement" under the savings clause of Section 2. *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (emphasis added). However, this Court has also made it clear in numerous decisions that a state may apply its laws to an agreement to arbitrate only "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987); *see Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 843 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Thus, a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue

does not comport with [the] requirement[s] of § 2." *Perry*, 482 U.S. at 493 n.9. By its plain language, the FAA preempts *any* state-law precept that makes arbitration agreements any less enforceable, less valid, or less irrevocable than other contract terms. *See Terminix*, 115 S. Ct. at 843; *see generally* Petr. Br. at 12-19.[1]

To convince this Court that Montana's notice statute is, in fact, a ground for the revocation of any contract, respondents seek to argue, first, that the parties' agreement to arbitrate would be void under Montana's general common law relating to adhesion contracts and, second, that Montana's notice statute merely "codifies" this common law principle. Resp. Br. at 24. At the outset, it bears noting that the trial court rejected respondents' argument below that the parties' arbitration agreement in this case violated Montana's common law of adhesion; that respondents then abandoned that argument on appeal in favor of their claim that petitioners failed to comply with the mandatory requirements of Montana's notice statute;[2] and that neither of the opinions of the Montana Supreme Court below ever even mentioned the purported common law principles of adhesion now proffered by respondents, let alone suggested that the parties' agreement in this case was void under Montana's common law.

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[1] Thus, the leading treatise on the FAA observes that "a state law singling out arbitration for more restrictive treatment than does its general contract law violates *Prima Paint . . .*; *Southland . . .* ; and *Perry. . . .*" 2 I. Macneil, et al., *Federal Arbitration Law* § 10.8.1, at 10:69 n.19 (1995) (citations omitted) (hereinafter *Federal Arbitration Law*).

[2] Respondents made a common law adhesion contract argument to the trial court in their February 12, 1993 brief, and supported that argument with an affidavit by respondent Paul Casarotto (App. 86-87). By ordering arbitration, the trial court implicitly rejected the argument, and respondents then abandoned their common law defense on appeal. (Appellants' Briefs, filed Dec. 2, 1993, Feb. 8, 1994, and Apr. 8, 1994); *see Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 216 n.2 (1985).

Nevertheless, even if one assumes *arguendo* that Montana's notice statute is identical to its common law, that fact would not supply a different answer to the question posed by this petition. The same principles of federal law that are set forth in petitioners' main brief would also prevent Montana from refusing to enforce the parties' arbitration agreement under its common law on the ground that a perfectly ordinary agreement to arbitrate in a standardized contract, such as the one involved here, is "unconscionable," "adhesive" or "unexpected." Under the FAA, Montana courts may not, as respondents urge, make a virtue out of that state's century-old refusal to enforce arbitration agreements,[3] and its desire to preserve access to its courts, by deciding that arbitration agreements are as a class especially "unexpected" or "important" and therefore unenforceable unless displayed more conspicuously than the other terms in a contract. It makes no difference whether such a public policy emanates from the state legislature, as in the case of the notice statute, or from judicial development of common law principles. *Perry*, 482 U.S. at 492 n.9. For arbitration agreements within its scope, the FAA makes any state policy disfavoring arbitration agreements unlawful, "for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent." *Terminix*, 115 S. Ct. at 843; *see Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983).

In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court made this point quite clear. There, the party seeking to be relieved of his arbitration obligation similarly argued that his arbitration agreement constituted an "unconscion-

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[3] Montana was one of the last states to adopt some form of arbitration law in 1985, in the wake of *Southland*. *See* Montana Senate Judiciary Comm. minutes at 6 (Jan. 21, 1985), lodged by respondents with the Court. Even then, Montana enacted several deviations from the Uniform Arbitration Act. *See* Petr. Br. at 17 n.9.

able, unenforceable contract of adhesion" under California's common law. 482 U.S. at 492-93 n.9. In discussing this common law argument, the Court emphasized that a state-law principle, "whether of legislative or judicial origin," that took its meaning precisely from the fact that an agreement to arbitrate was at issue does not comply with the savings clause of Section 2, because that clause is limited to grounds that exist for the revocation of "contracts generally." *Id.* Thus, even though in theory any contract provision might be held to be "unconscionable," the Court instructed that "[a] court may [not] rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold the state legislature cannot." *Id.; accord Southland*, 465 U.S. at 16 n.11.

Just last Term, this Court in *Terminix* reaffirmed this construction of Section 2. The Court declared in no uncertain terms that under the savings clause of Section 2, "[s]tates may not [] decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Terminix*, 115 S. Ct. at 843. "[A]ny such state policy [is] unlawful . . . ." *Id.*

If, therefore, as respondents now claim, Montana courts always, or even presumptively,[4] invalidate arbitration

[4] As construed by respondents, Montana's law replaces the federal presumption in favor of arbitration with a state presumption against arbitration. However, the FAA establishes, as a matter of federal law, that any doubts concerning arbitrability "'should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or like *defenses to arbitration.*'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct., 1212, 1218 n.8 (1995) (emphasis added) (quoting *Moses H. Cone*, 460 U.S. at 24-25); *see First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1924 (1995). "[B]y skewing the otherwise hospitable inquiry into arbitrability," the Montana law stands in direct conflict with Section 2. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

agreements contained in standardized contracts as "unexpected" unless they are more prominently disclosed than the other terms of the contract, that state-law principle would violate the express terms of Section 2 and the clear teachings of *Southland*, *Perry* and *Terminix*. For such courts would, then, be applying a state-law principle that took its meaning solely from the fact that the subject matter of the term claimed to be "unexpected" is an agreement to arbitrate.

There is no reason why *Perry*'s holding regarding the impact of the FAA on a state's application of its law of unconscionability should have any less force when a state seeks, instead, to invalidate an arbitration clause based upon its common law relating to adhesion contracts. Inevitably, both doctrines reflect value judgments that are made about what types of agreements courts will and will not enforce. *See* Restatement (Second) of Contracts § 211 cmt. F (adhesion principles are "closely related to the policy against unconscionable terms"). Montana courts surely would not refuse to enforce a term in a standardized agreement that was considered to be favorable to a franchisee, or a term in a contract of adhesion that provided for litigation of all disputes in the courts—even if such terms were not "conspicuously" disclosed. 3 L. Cunningham et al., *Corbin on Contracts* § 559A, supp. 374 (1994) ("what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not").[5]

[5] Under ordinary common law principles, courts do not always or even usually invalidate the provisions of a contract of adhesion. *Corbin on Contracts* § 559A, at supp. 374. "Thus, a contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise." *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal. 1981) (citations omitted). Comment F to Section 211 of the Restatement (Second)

Therefore, if, as respondents claim, Montana courts invalidate arbitration agreements contained in standardized contracts as "unexpected" unless they are "conspicuously" disclosed, they must do so precisely because the clause in question involves arbitration. Yet, Section 2 prohibits states from making value judgments about whether to enforce arbitration agreements—under either the doctrine of unconscionability or adhesion—that rely upon the fact that an agreement to arbitrate in particular is at issue. *See, e.g., Terminix,* 115 S. Ct. at 843; *Perry,* 482 U.S. at 492-93 n.9; *Southland,* 465 U.S. at 16 n.11; *see also Mitsubishi,* 473 U.S. at 628; *cf. American Airlines, Inc. v. Wolens,* 115 S. Ct. 817, 826 n.8 (1995) (state law contract principles may be preempted to the extent they seek to effectuate a state public policy, rather than the intent of the parties).

Accordingly, lower courts have consistently rejected arguments, like those made by respondents, that have sought to justify statutory regulation of arbitration, through notice or similar requirements, on the ground that a state could instead impose the same requirements under the state's common law of adhesion. Expressly relying on this Court's decision in *Perry*, the First Circuit in *Securities Industry Ass'n v. Connolly,* 883 F.2d 1114 (1st Cir. 1989), *cert. denied,* 495 U.S. 956 (1990), explained:

> Massachusetts could also pass legislation declaring all contracts of adhesion presumptively unenforceable. Such a rule would apply to arbitration agreements, *among others.* But Massachusetts may not say (judicially, legislatively, or in a regulatory mode) that "adhesion contracts are especially bad when arbitration is included, so we will therefore ban, or place gyves and shackles upon, only those adhesive contracts which contain arbitration clauses."

of Contracts describes the circumstances under which courts will invalidate "unexpected" terms in a contract of adhesion as limited to "bizarre or oppressive" terms or terms that "eliminate[] the dominant purpose of the transaction."

> That kind of value judgment is foreclosed precisely because the FAA ordains that the state's appulse toward arbitration agreements must be the same as its approach to contracts generally.

Id. at 1121.[6] Similarly, in *Saturn Distribution Corp. v. Williams,* 905 F.2d 719 (4th Cir.), *cert. denied,* 498 U.S. 983 (1990), the Fourth Circuit held:

> If Virginia uniformly barred the formation of nonnegotiable contractual terms or declared all contracts of adhesion to be presumptively unenforceable, then the statute at issue would not be at odds with general contract law. . . . However, . . . Virginia does not always, or even usually, presume adhesive contracts to be unenforceable. Instead, Virginia adheres to the general rule that: "The use of a standard form contract between two parties of admittedly unequal bargaining power does not invalidate an otherwise valid contractual provision". . . .
>
> Thus, we hold that the statute is preempted because, as in *Southland*, it treats arbitration agreements more harshly than other contracts. . . .

Id. at 725-26.[7]

[6] The court in *Connolly* went on to observe: "Although any fraudulent, adhesive, or economically coerced agreement to arbitrate would be challengeable, the Supreme Court has suggested that such challenges must not only be brought on grounds common to contracts generally, but must also be proven on the facts of the individual case, not automatically shunted to one side according to practices governing the formation of arbitration agreements as a class of contracts." 883 F.2d at 1121 n.5 (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989)).

[7] Likewise, it is irrelevant that Montana law may also require certain types of installment contracts to include conspicuous notice of particular rights or omissions. *See* Resp. Br. at 5. Such "specialized provisions applicable only to certain types of contracts do not form a cohesive general law or pattern of laws applicable to most contracts," as contemplated by Section 2's savings clause. *Saturn,* 905 F.2d at 726 n.5; *see Southland,* 465 U.S. at 16 n.11.

Finally, to accept respondents' argument that courts may use common law principles of adhesion to deny enforcement of arbitration agreements, but not other terms, in standardized contracts would open a gaping hole in the fabric of national uniformity that Congress sought to create in enacting the FAA. After all, Congress passed the FAA to overcome judicial reluctance to enforce arbitration agreements. *Terminix*, 115 S. Ct. at 839; *McMahon*, 482 U.S. at 225; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). Courts should, therefore, "be on guard for artifices in which the ancient suspicion of arbitration might reappear." *Connolly*, 883 F.2d at 1119; *see McMahon*, 482 U.S. at 226; *Moses H. Cone*, 460 U.S. at 24-25. If a state like Alabama, whose statutory ban on pre-dispute arbitration was found to be preempted in *Terminix*, could perpetuate a public policy suspicious of arbitration by having its courts simply declare pre-dispute arbitration agreements (but no other terms) in standardized contracts to be "unconscionable," "adhesive" or "unexpected," it would be able to achieve through its common law that which this Court has explicitly held it may not do by statute. *See Terminix*, 115 S. Ct. at 843; *Perry*, 482 U.S. at 493 n.9; *Southland*, 465 U.S. at 16 n.11. Because the FAA makes any such state policy, whether of legislative or judicial origin, unlawful, *see Terminix*, 115 S. Ct. at 843, respondents' claim that Montana's notice statute merely embodies its common law does not save the statute from preemption by the FAA.

B. Respondents also fail in their recent effort to recast the notice statute as merely a codification of Montana's common law relating to adhesion contracts.[8] As an initial matter, it is abundantly clear from the face of the notice statute itself that this law has nothing to do with

[8] Neither in their briefs in the Montana Supreme Court nor in their two oppositions to certiorari before this Court did respondents ever suggest that Montana's notice statute codified that state's common law of adhesion.

Montana's common law of adhesion, which undoubtedly is why the Montana Supreme Court in its multiple opinions below explaining this statute never once mentioned the phrase "adhesion contract," let alone discussed Montana's common law of adhesion.[9] By its plain language, the Montana statute bars enforcement of the arbitration term of every contract that omits the precise form of notice prescribed by the statute, regardless whether the term was bargained-for or non-negotiable; whether arbitration was unusual or expected; whether the transaction involved two corporations of equal bargaining power or a consumer; or whether the clause was specifically discussed and explained, or (as here) was read by each of the parties. *See supra* n.6. Thus, the Montana Supreme Court voided the parties' agreement to arbitrate without regard to any facts other than the fact that the franchise agreement did not have the prescribed notice. To the extent, therefore, that respondents' arguments are founded on the notion that Montana enacted this statute to provide special protections for particular categories of parties or types of contracts, they are obviously off the mark.

Respondents are equally wrong in their claim that a neutral application of Montana's general common law relating to adhesion contracts would void the parties' arbitration agreement in this case. There is nothing remarkable about this transaction or the arbitration term itself (which is a typical arbitration provision) that would cause a court in Montana or anywhere else to invalidate the parties' arbitration agreement as an invalid contract of adhesion.

[9] That the Montana Supreme Court does not share respondents' novel construction of the notice statute is also borne out by the court's analysis of the choice of law issue. The Montana Supreme Court voided the parties' choice of Connecticut law, not on the basis of Montana's common law policies regarding adhesion contracts, but rather because of a public policy, evidenced by the notice statute, that is suspicious of arbitration as potentially inconvenient, expensive and devoid of the procedural safeguards attendant to judicial proceedings. App. 20-21.

Certainly, the presence of a dispute resolution clause is hardly unexpected in a franchise agreement.[10] As is true of so many commercial transactions today, "no franchise structure would be complete without providing for what happens in the event of a dispute between the franchisor and its franchisees. . . . [A]rbitration or litigation must be specified." David J. Kaufman, *An Introduction to Franchising and Franchise Law*, in *Franchising 1992: Business and Legal Issues* 9, 41 (Practising Law Inst. ed., 1992).[11] Thus, commentators have observed that "the theory underlying judicial refusal to enforce adhesion contracts—that the offeror does not expect the offeree to read and be familiar with them—is not consistent with the disclosure obligations imposed upon franchisors, the size and seriousness of the business transaction, and the extent of the responsibilities to be undertaken by the

[10] Indeed, Mr. Casarotto had considerably more disclosure of contract terms than is the case with most commercial contracts because DAI complied with its disclosure requirements under the Federal Trade Commission's ("FTC") Franchise Rule, 16 C.F.R. Part 436. *See generally* Lydia B. Parnes, *Federal Trade Commission Regulation of Franchising*, in *Franchising 1992: Business and Legal Issues* 99 (Practising Law Inst. ed., 1992). DAI's franchise offering circular informed Mr. Casarotto of the arbitration provision and gave him a written notice from the FTC of the need to read the contract carefully and to review it with a business advisor such as a lawyer. Petr. Br. at 4 n.3; App. 62-63. Mr. Casarotto received two copies of the offering circular, the first, two months before he signed the franchise agreement, and the second, two weeks before he signed. Appendix to Appellees' Br., Exh. 1 (between p. 10 and p. 11), filed Jan. 14, 1994, in the Montana Supreme Court.

[11] Paul Casarotto admits that "I read the agreement over before I signed it." App. 87. While he claimed in the trial court—before abandoning his adhesion contract argument on appeal—that he did not appreciate the meaning of the arbitration clause or realize that he was waiving his right of access to court, *id.*, there is no general state-law principle requiring a franchisor to explain the meaning of a contract term to a franchisee. *See e.g., Chor v. Piper, Jaffray & Hopwood, Inc.*, 862 P.2d 26, 30 (Mont. 1993); *Brill v. Catfish Shaks of America, Inc.*, 727 F. Supp. 1035, 1039 n.6 (E.D. La. 1989).

franchisees." 2 W. Michael Garner, *Franch. & Distr. Law & Prac.* § 8:27 (1990) (footnote omitted).

Courts have, therefore, repeatedly recognized that arbitration clauses are to be expected in franchise agreements and similar business relationships involving standard-form contracts.[12] Thus, in *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds, Southland Corp. v. Keating*, 465 U.S. 1 (1984), a class action involving 7-Eleven franchisees, the California Supreme Court observed that arbitration of disputes, even those relating to a franchise relationship set forth in a contract of adhesion, "is generally considered to be a mutually advantageous process," and that "provision for arbitration in a commercial context is quite common, and reasonably to be anticipated." *Id.* at 1198.[13]

[12] *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) ("standard customer agreement"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ("Uniform Application for Securities Industry Registration"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (standard "Distributor Agreement"); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (standard franchise agreement). The Restatement (Second) of Contracts accepts and even applauds the utility of standardization, *see id.* § 211 cmt. a, and it is widely acknowledged that "standardization, uniformity in the operation of the system, and the opportunity to learn how to run a business are what the franchisee pays for, and these benefits cannot exist without standardized terms enforceable upon all units in the system." Garner, *Franch. & Distr. Law & Prac.* § 8:27.

[13] *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2325 (1995) (shipping agreement); *McMahon*, 482 U.S. at 227 (brokerage agreement); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 249 (2d Cir.), *cert. dismissed*, 501 U.S. 1267 (1991) (trading agreement).

Indeed, the revocation of an arbitration clause as outside a party's "reasonable expectations" is virtually unprecedented. *See generally* 2 *Federal Arbitration Law* § 19.3.3. Respondents can cite only two cases that have voided arbitration provisions in adhesion contracts, neither of which dealt with a commercial transaction. *See* Resp. Br. at 19-20. *Broemmer v. Abortion Services of Phoenix,*

The Montana Supreme Court itself has recognized that arbitration clauses in nonnegotiable standardized contracts are "common" and are not considered unexpected as a matter of Montana's common law. *Passage v. Prudential-Bache Sec., Inc.*, 727 P.2d 1298, 1301-02 (Mont. 1986) (enforcing arbitration clause in fourteenth paragraph of broker's customer agreement form, in same typeface as other clauses), *cert. denied*, 480 U.S. 905 (1987). Thus, federal and state courts in Montana have enforced arbitration agreements contained in standardized franchise contracts.[14] Indeed, in *Chor v. Piper, Jaffray & Hopwood, Inc.*, 862 P.2d 26 (Mont. 1993), the Montana Supreme Court rejected a common law contract of adhesion defense that was founded on testimony virtually identical to Casarotto's claim in this case—that Chor "did not fully understand the legal impact" of an arbitration provision she had read. Consistent with the law generally, the Montana court held that "a party cannot avoid the legal consequences of an agreement simply by later claiming that she did not understand the impact of the plain language of the contract on her legal rights." *Id.* at 30; *see also Vukasin v. D.A. Davidson & Co.*, 785 P.2d 713, 715

Ltd., 840 P.2d 1013 (Ariz. 1992), was not decided under the FAA, and contrary to respondents' arguments here, it rejected "the invitation to attempt to establish some 'bright-line' rule of broad applicability." *Wheeler v. St. Joseph Hospital*, 133 Cal. Rptr. 775 (Cal. Ct. App. 1976), also was not decided under the FAA. Not only did the court rely on a viewpoint contrary to the FAA—that the patient "forfeit[ed] a valuable right" by agreeing to arbitrate, *id.* at 786—it also contrasted the hospital setting to commercial contracts where the presence of a dispute resolution clause, including an arbitration agreement, is reasonably to be expected. *Id.* at 786-88 & n.12.

[14] *See King v. Postal Annex, Inc.*, CV-94-011-GF (D. Mont. Dec. 14, 1995) (franchise agreement); *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468 (D. Mont. 1993) (dealership agreement from 1990); *Downey v. Christensen*, 825 P.2d 557 (Mont. 1992) (donut shop franchise agreement from 1987).

(Mont. 1990) (rejecting similar claim); *Larsen v. Opie*, 771 P.2d 977, 978 (Mont. 1989) (same).[15]

Contrary to respondents' claim, therefore, the parties' arbitration agreement in this case would be fully enforceable under general principles of Montana's common law—unless, of course, Montana were to alter that law so as to make arbitration agreements less enforceable than other contractual provisions. As a consequence, respondents and the Montana Supreme Court (led by the dissenter in *Chor*) turned to the only avenue left to invalidate the parties' agreement to arbitrate—a specialized notice statute that places agreements to arbitrate on a different footing from other contract terms. That statute, however, as we have explained, is in direct and irreconcilable conflict with Section 2 of the FAA.

II. THE FEDERAL ARBITRATION ACT PREEMPTS STATE-LAW LIMITATIONS ON ENFORCING ARBITRATION AGREEMENTS.

Finally, respondents ask this Court to imply a new exception to Section 2 on the ground that the FAA should not preempt "state attempts to ensure that parties *know* that the contract they are signing includes an arbitration provision." Resp. Br. at 25. As petitioners demonstrated in their main brief, however, this Court has previously rejected identical invitations to undercut the nationwide uniformity that Congress sought to achieve in enacting the FAA. Petr. Br. at 13-18. Respondents provide no compelling reason to depart from that established precedent here.

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[15] There is also no cause for this Court to assume, as respondents do, that when he decided to enter the sandwich shop business, Mr. Casarotto could not have found another franchisor that did not require arbitration or could not simply have operated a sandwich business without seeking the benefits of a franchise arrangement, and thereby have avoided a provision that he apparently now finds disagreeable. *See Rodriguez de Quijas*, 490 U.S. at 484; *Leibrand v. National Farmers Union Prop. & Cas. Co.*, 898 P.2d 1220, 1227 (Mont. 1995); *Chor*, 862 P.2d at 30.

In enacting the FAA, Congress sought broadly to overcome judicial and legislative hostility to arbitration. *Terminix*, 115 S. Ct. at 839; *Scherk*, 417 U.S. at 510-11. To that end, Congress chose to make its own assessment of when agreements to arbitrate will be enforced, "unencumbered by state-law constraints." *Southland*, 465 U.S. at 13. The congressional policy of "rigorously enforc[ing] agreements to arbitrate," *Dean Witter Reynolds*, 470 U.S. at 221, is reflected in the minimal requirements imposed by the FAA—that the agreement to arbitrate be part of a written contract evidencing a transaction involving interstate commerce and that it be irrevocable except upon grounds for the revocation of any contract. Because "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," this Court has recognized that the FAA's "broad principle of enforceability is [not] subject to any additional limitations under state law." *Southland*, 465 U.S. at 11, 16; *see Perry*, 482 U.S. at 489.[16]

Congress, therefore, left no room for "a state policy of providing special protection for franchisees," consumers or any other group. *Southland*, 465 U.S. at 17 n.11 (internal quotation marks omitted); *see Mitsubishi*, 473 U.S. at 628; 2 *Federal Arbitration Law* § 19.1.1., at 19:4-5 (under *Southland* and *Perry* "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted"). Accordingly, this Court has repeatedly enforced

[16] Respondents never quote or even cite the governing passages in *Perry* and *Southland*, choosing instead to argue on the basis of legislative history cited in a dissenting opinion and general principles of preemption and to ignore this Court's already abundant jurisprudence on the scope of the FAA. *See* Resp. Br. at 26-28. It is clear from the Senate Hearing cited by respondents that Congress added Section 1 of the FAA to address the concerns quoted in respondents' brief. *Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary*, 67th Cong., 4th Sess. 9 (1923); *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-03 n.9 (1967).

arbitration clauses in cases involving standardized agreements and unequal bargaining power, even in cases involving consumers. *See, e.g., Terminix*, 115 S. Ct. at 483; *Gilmer*, 500 U.S. at 35; *Rodriguez de Quijas*, 490 U.S. at 484; *Southland*, 465 U.S. at 16-17; *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991) (forum selection clauses contained in "three pages of fine print"). Special protection from arbitration agreements, if any truly is needed, must come from Congress, not state legislatures or courts. *McMahon*, 482 U.S. at 226; *Mitsubishi*, 473 U.S. at 627.

Not only are respondents unable to harmonize their position with the language of Section 2 and this Court's decisions under that section, but they also are unable to reconcile their desire to let each state set its own requirements for enforcing arbitration agreements with the national uniformity contemplated by Section 2. *See* Petr. Br. at 23-29; *see also Terminix*, 115 S. Ct. at 843-44 (O'Connor, J., concurring) ("my agreement with the Court's construction of § 2 rests largely on the wisdom of maintaining a uniform standard"). They emphasize that "[s]ophisticated market participants transacting business in multiple states" must already adhere to a wide array of state-specific requirements. Resp. Br. at 30-33. However, respondents say nothing about whether the laws they cite affect the enforceability of arbitration agreements, an area governed by a *federal* law that was motivated by a desire for nationwide uniformity. *Terminix*, 115 S. Ct. at 838-40; *Southland*, 465 U.S. at 12; *Perry*, 482 U.S. at 492 n.9.[17]

With respect to arbitration, the only variation in state laws that Congress determined that interstate businesses need be concerned with are the differences that might

[17] Surprisingly, respondents rely upon the same California franchise statute that this Court found preempted in *Southland* as an example of how companies must cope with varying state regulatory schemes. Resp. Br. at 31 n.9.

arise in the general principles of contract law that fall within the ambit of Section 2's savings clause. As this Court has observed, however, contract law at its core, such as that incorporated by the savings clause, is not "diverse, nonuniform and confusing." *American Airlines*, 115 S. Ct. at 826 n.8 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519 (1992) (plurality opinion)). Thus, general principles of contract law typically do not impose contradictory and non-uniform requirement in the way that some states have imposed inconsistent methods of providing notice of arbitration. *See* Petr. Br. at 26 n.17, 28 n.20.[18]

By incorporating state law only "if that law arose to govern issues concerning the validity, revocability and enforceability of contracts generally," *Perry*, 482 U.S. at 493 n.9; *see Terminix*, 115 S. Ct. at 843, the savings clause of Section 2 serves as an important filter for state laws that discriminate against arbitration. For it is unlikely that a state would be willing to skew its law applicable to contracts generally simply to invalidate or burden arbitration agreements. It was, therefore, entirely consistent for Congress, when it enacted the FAA, to have included the savings clause to preserve the vitality

[18] Respondents forget that although national businesses must deal with varying state laws, one of the tools they use for that purpose is to include choice-of-law clauses in their contracts. In this case, DAI was deprived of its choice of Connecticut law because the Montana Supreme Court elevated the arbitration-specific notice statute to the level of a fundamental public policy. The preemption analysis that respondents support, therefore, would make the legal climate more unpredictable for national businesses, because a state could apply its own particular arbitration notice statute regardless of the parties' intent to apply another state's law. The result in this case would vary depending on whether respondents had sued in Montana, Connecticut or Delaware (respondents' residence since before this lawsuit was brought), since the latter two states would certainly have had no reason to have rejected the parties' choice of law and applied Montana's notice requirements to invalidate the parties' agreement to arbitrate.

of state general contract law—which provides the basic infrastructure for agreements to arbitrate as well as other contracts [19]—while at the same time preempting state notice laws like Montana's that impose special requirements on arbitration agreements that are not imposed on other contract terms. *Terminix*, 115 S. Ct. at 843; *id.* at 843-44 (O'Connor, J., concurring). As a matter of federal law, therefore, Montana's courts must enforce the parties' agreement to arbitrate. *Id.* at 843; *Mitsubishi*, 473 U.S. at 628.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted,

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[19] *See First Options*, 115 S. Ct. at 1924; 2 *Federal Arbitration Law* § 10.6.2.1, at 10:27.